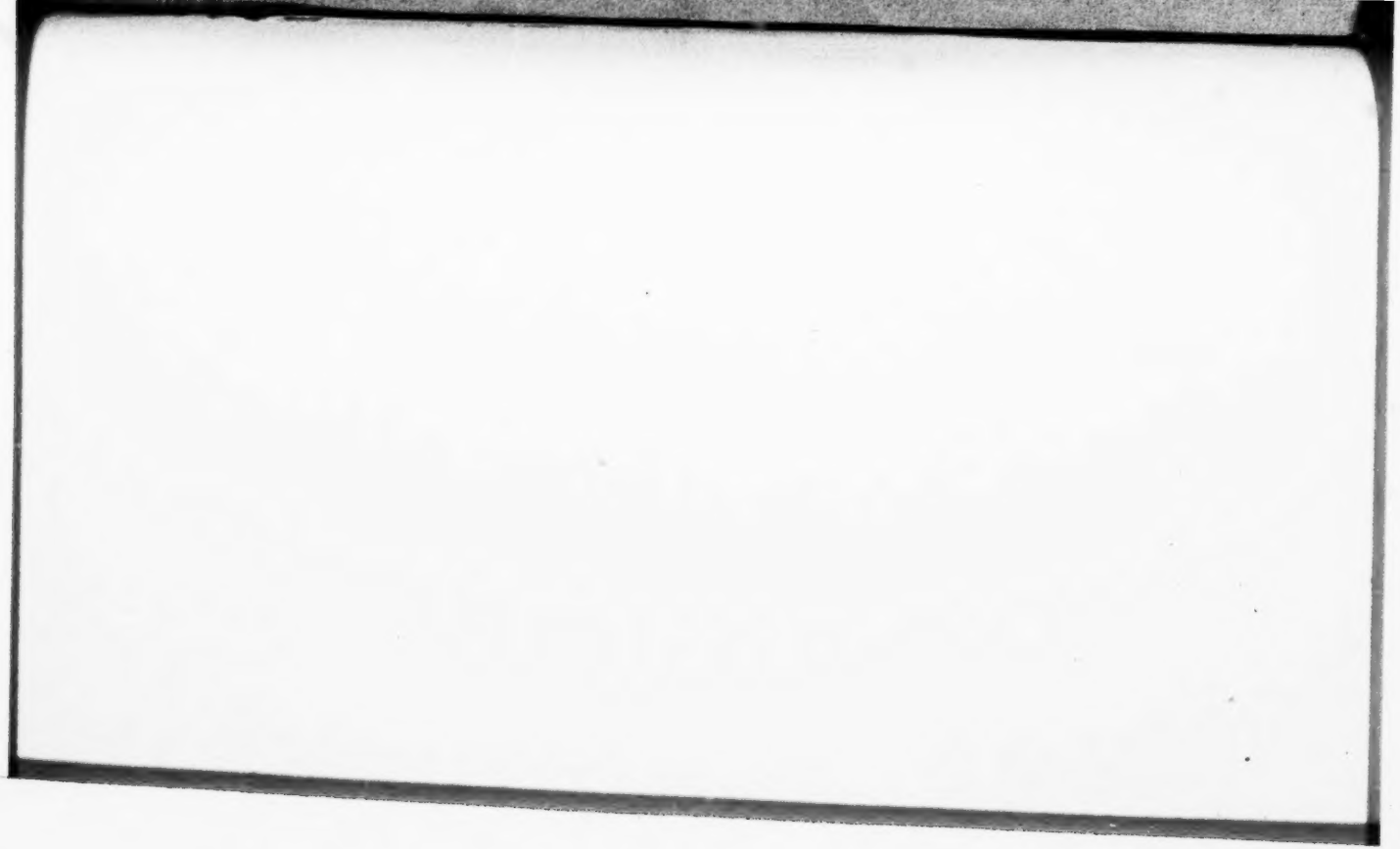
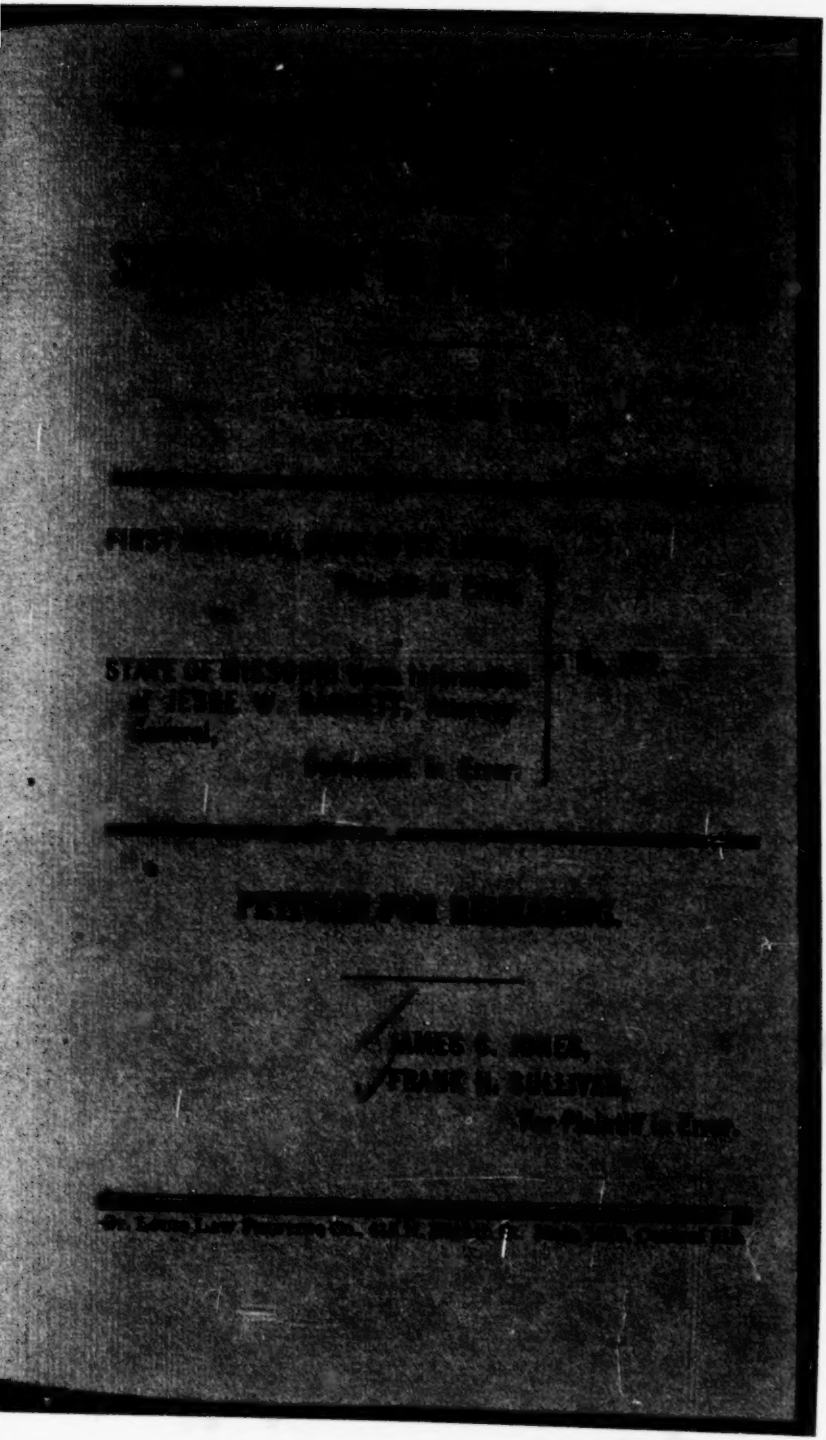
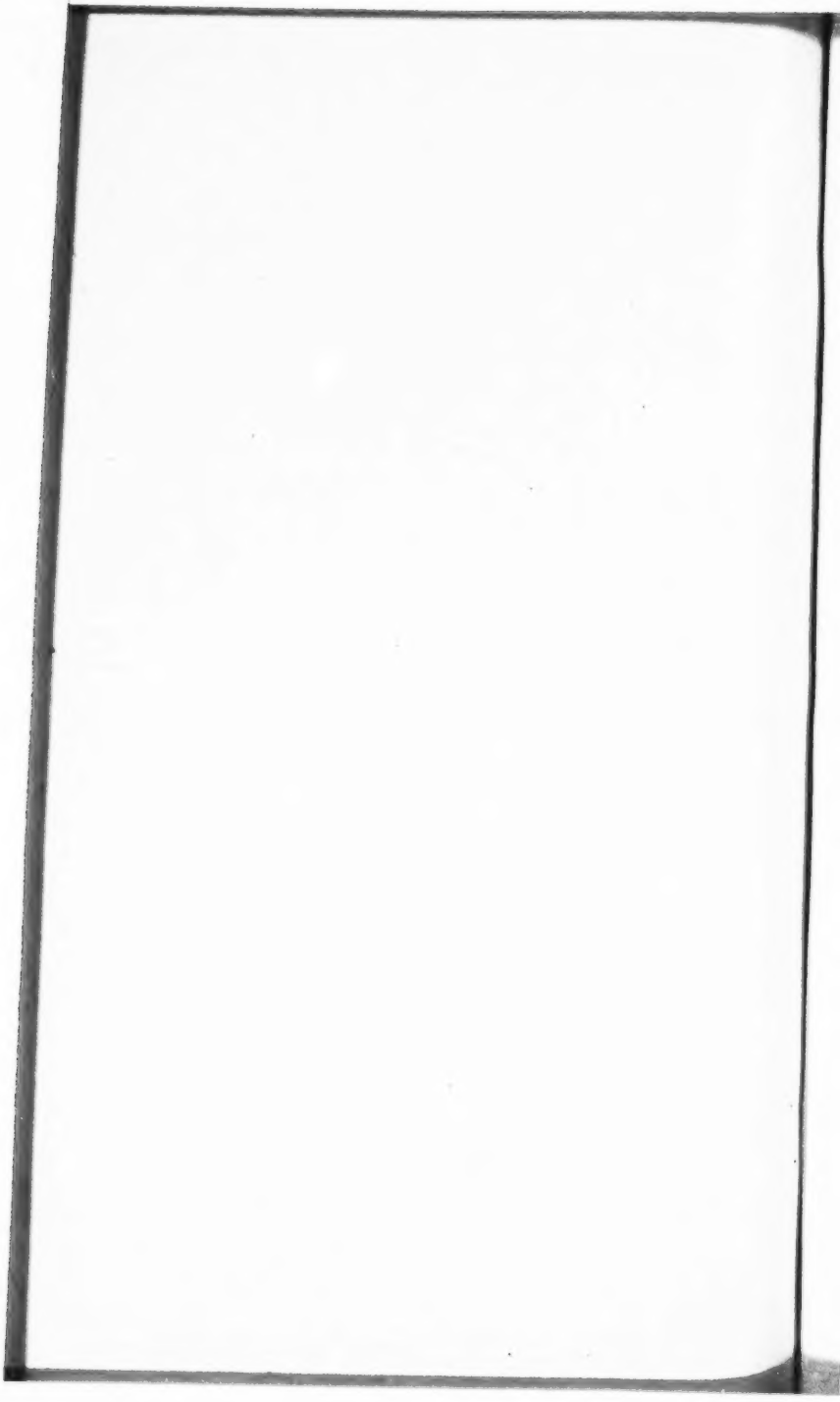






IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST. LOUIS, Plaintiff in Error, vs. STATE OF MISSOURI Upon Information of JESSE W. BARRETT, Attorney-General, Defendant in Error.	No. 252.

PETITION FOR REHEARING.

And now comes the plaintiff in error and respectfully asks for a rehearing of this cause, for the reason following:

The majority opinion is in error in affirming the validity of Revised Statutes of Missouri, Section 11737, as applied to a national bank.

In support of which the plaintiff in error submits these considerations:

A. The statute in question is a part of a statutory scheme for the organization and regulation of banking *corporations*. This is made manifest by an examination of accompanying sections of the statute, such as Sections 11728, 11729, etc. (Revised St. Mo. 1919). Indeed, it is equally plain from the terms of section 11737 itself. Previous sections having provided for the formation of banking corporations, the provisions of section 11737 are introduced by this language: "Every *such corporation* shall be authorized and empowered," etc. Following this is the enumeration of the corporate powers conferred upon the creatures thus provided for, and appended thereto are the words: "*Provided, however*, that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in *its* own banking house."

The statute is barren of any suggestion of a legislative intent to regulate *the number of banks which may compete with each other in a given community*, except in the denial of *capacity to a corporation* to own more than one of them. This is the necessary effect of the language of the statute, and there is nothing in the opinion of the State Court to indicate otherwise.

It was apparently thought unwise that one *corporation* should own or operate more than *one bank*, and *corporate capacity* to do so was denied.

The majority opinion, in its essence, therefore, affirms the power of a state to regulate the corporate capacity of a national bank. Regard for fundamentals of our system of government demonstrates that this cannot be.

The conclusion is rested solely upon general expressions of prior opinions, dealing with state statutes of far different import and effect.

B. The state statute forbids an incorporated bank to pay checks at any place other than its own banking house. In Merchants Bank v. State Bank, 10 Wall. 605, this Court held that under the National Bank Act, and notwithstanding Revised Statutes, Section 5190, a bank has *incidental power* to purchase bullion and certify the checks of its customers and disburse its funds at a place *other than its banking house.* The statute of the state, therefore, if valid, *has effect to deprive a national bank of a portion of the incidental powers conferred upon it by Congress.* How can a State Legislature repeal an Act of Congress respecting the powers of a national bank?

C. As a specification admitting of no exception, the formula that a state statute affecting a national bank is valid unless it conflicts with an Act of Congress, or

impairs the efficiency of the bank as an agency of the National Government, is too broad if applied without reference to the provisions of the statute itself.

It was first made use of in National Bank v. Commonwealth, 9 Wall. 353, in dealing with the exercise of the *power of taxation conferred by Congress on the states.* Read in the light of what was there in judgment, *the expression is that state legislation directly affecting national banks is valid when authorized by Congress and when so framed as not to conflict with national legislation or to impair the efficiency of the bank.*

The later applications of the rule have been to "general, undiscriminating laws" (First National Bank v. California, 262 U. S. 366, 369), passed, not *to regulate affairs of national banks or their corporate capacity and functions,* but in regulation of business transactions of the community of which they are a part.

D. The cases hitherto at the bar of the Court which have really dealt with the question here in judgment have been McCulloch v. Maryland, 4 Wheat. 316; Osborne v. Bank, 9 Wheat. 738, and Easton v. Iowa, 188 U. S. 220, 230, 237.

In the two former there were under review state statutes designed to regulate the corporate functioning of national banks. The opinions were based, not

on any conflict between state and national legislation, but upon *the entire lack of sovereignty of the state over the subject matter.*

In Easton v. Iowa the statute proposed to regulate the internal management of the bank; and that pronouncement dealt with the question from both aspects, *i. e.*, state regulation of the internal affairs of a national bank, and conflict with Congressional enactments. As to the former, it was said that national banks were "*independent, so far as powers are concerned, of state legislation.*"

The true rule to be extracted from the utterances of this Court is that the state may *regulate the contracts and dealings of the community,* and the regulation is binding on national banks as members of the community, unless Congress has prescribed a different rule as to national banks or the regulation impairs their efficiency; but questions as to their *corporate capacity* are determinable only by those laws which *confer* the capacity. A state statute dealing with *that subject* fails for an inherent lack of sovereignty over the subject; no matter what Congress may or may not have prescribed on the same question.

E. It is respectfully submitted that, under the pronouncement of the majority opinion, a state statute of this type is held valid only when entirely ineffectual and without force or effect.

It is said that R. S. 5190 forbids a national bank to have a branch office. And if Congress have not expressly forbidden such, but have merely refrained from granting the power, the same situation exists, for powers not granted are forbidden by implication (First National Bank v. Exchange Bank, 92 U. S. 122; Central Co. v. Pullman Co., 139 U. S. 24).

That question we now lay aside; but if Congress have forbidden, or have not granted the power in question, *what change was made in the law with respect thereto by this state statute?* And may the state take over undoubted national functions by merely echoing national statutes?

The practical effect of the majority opinion accords no other force or effect than the foregoing to the statute. The state proceeds, *pro forma*, under its own statute, it is true; but, in essence, the only effect of its statute is to enable it to assume functions of the National Government in the enforcement of national laws. This is certainly the first instance where this Court has declared a state law respecting a national bank to be a valid enactment, *where the presence or absence of the statute made absolutely no change in the applicatory rules of law*, as this statute is held by the majority opinion to do.

"The very meaning of sovereignty is that the decree of the sovereign *makes law*" (American Banana Co. v. United Fruit Co., 213 U. S. 358). The decree

of the state in this case makes nothing and can make nothing. If the bank has, under the act of Congress, power to do the thing in question, the state cannot take it away; if it has it not, the state cannot confer it. What "law" or change in the "law" did this decree of the State Legislature make, or what could it make? And if none, then sovereignty over the subject matter is wanting.

F. The application of state laws as rules of decision concerning the transactions of national banks is by no means limited to state statutes; everyday observation shows the doctrine to embrace the unwritten or judicially declared law as well.

The fundamental basis for the application of the law of the locality to a national bank is the consent of Congress, express or implied. This must be true; for it is the settled doctrine of this Court that national banks "*are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the Government may permit*" (Van Reed v. People's National Bank, 198 U. S. 554, 557; Farmers' Bank v. Dearing, 91 U. S. 29, 34).

The consent of the National Legislature to the exercise of the power of taxation by the states was expressly given. Under that grant of power the *procedure* adopted by the states to carry into execution the power of taxation thus expressly conferred was

held a matter for their own choice, *unless the method selected conflicted with some legislation by Congress or was so shaped as to impair the efficiency of the bank as a Federal agency.* Upon this formula the tax machinery prescribed by Kentucky in execution of the power was examined and approved in National Bank v. Commonwealth, 9 Wall. 353; and that of Vermont in Waite v. Dowley, 94 U. S. 527. These are two of the cases cited in the majority opinion; the point in judgment in each was as stated; and they are authority for nothing beyond, because, under familiar rules, they are to be read in the light of the facts in judgment.

With respect to the application of "*general, undiscriminating state laws*" to "the *contracts and dealings*" of national banks (First National Bank v. California, 262 U. S. 366, 369), the authorization of Congress for the application of the state law is *implied* from the creation of such banks to engage in business in a given state, without prescribing the rules of law to govern the conduct of their transactions. The same limitation has been announced to prevail here also, to wit, that even the general laws of the state may not be applied to the transactions of a national bank if they conflict with congressional regulations or impair the efficiency of the bank as an agency of government. Accordingly, in Davis v. Elmira Savings Bank, 161 U. S. 275, the insolvent

laws of a state of general terms and application were held inapplicable to insolvent national banks, because in conflict with congressional regulations; while in McClellan v. Chipman, 164 U. S. 347, such general insolvent laws of the state were held binding on a national bank *as a creditor* of the insolvent, because Congress had not legislated on the subject.

These are the two remaining cases cited in support of the majority opinion. It seems plain that they are not authority for state legislation respecting the corporate capacity and functions of a national bank for the reason that they do not deal with that question.

And *where is found the consent of Congress that the states may, by statute, prescribe the corporate capacity or deal with the internal regulations of a national bank?* With that subject Congress completely dealt by inclusion and exclusion, and into that field it has not invited the states, either expressly or impliedly. *Indeed, it has been pointedly held that Congress intended to exclude the states from that very function* (Easton v. Iowa, 188 U. S. 220, 229).

G. There are various and sundry internal regulations prescribed by Congress with respect to national banks.

By way of illustration: A provision as to when they may and when they may not lend money on real estate (38 St. 273, Sec. 24); regulation of their ac-

ceptance and discount of bills of exchange (Id., p. 263, Sec. 13); the establishment of foreign branches (Id., p. 273, Sec. 25); removal to another town in the same state (24 St. c. 73, Sec. 2); ownership of real estate (R. S. 5137); amount of capitalization (31 St. 48 c. 41, Sec. 10); method of providing it (R. S. 5140) and of reducing and increasing it (R. S. 5142 and 5143); the rights of shareholders to vote (R. S. 5144); the qualifications of directors (R. S. 5146 and 38 St. 732, Sec. 8); the manner of qualifying as a director (R. S. 5147); limiting loans to one person or concern (R. S. 5200, amended 41 St. 296, Ch. 79); limiting its indebtedness (R. S. 202, amended 41 St. 296, Ch. 79).

Other regulations might be mentioned, just as internal, but not more so than R. S. 5190 involved here.

The method prescribed for the enforcement of these regulations (including R. S. 5190) is the same, viz., an action in the name of the United States (12 St. 680, Ch. 58, Sec. 55) or in the name of the Comptroller (R. S. 5239) to compel the bank to observe the limitations prescribed.

Now, suppose the state should place all these regulations (and the other similar ones to which we have not referred) upon its own statute books. It could not be said that there would then be any express conflict between the state statutes and the acts of Congress in the sense that differing provisions are prescribed. And yet it must be apparent that if such

statutes are to be held valid, *the entire supervision of the internal management of national banks has been accorded to the states in which they are located.*

Were it not beyond the proper limits of this presentation, the same situation might be demonstrated to exist with respect to the federal land banks and the joint stock land banks (Act July 17, 1916, Ch. 245, 39 St. 360) and other incorporated federal agencies.

H. And the fact is that never before has the rule respecting the validity of a state statute when not in conflict with an act of Congress been applied to a situation *where Congress have dealt with the question.* The prior instances have been where Congress had said nothing on the particular subject.

But Congress dealt with the powers of the bank (and, as R. S. 5190 is interpreted, with its powers in the respect here under inquiry).

The true rule to be applied is, as declared in Easton v. Iowa, 188 U. S. 220, and earlier cases there cited, that where Congress have dealt supremely with a subject state legislation is excluded, of whatsoever tenor.

I. This is certainly a visatorial statute, if it is anything (Guthrie v. Harkness, 199 U. S. 157). Congress, having amply provided for visitation, in court and otherwise, of national banks, expressly forbade

visitation to the state legislatures (R. S. 5241, 38 St. Part. I, 272, Ch. 6, Sec. 21). Its constitutional power to so do cannot admit of question (Van Reed v. People's National Bank, 198 U. S. 554; Farmers' Bank v. Dearing, 91 U. S. 29).

We stress no other question than the foregoing at this time, for two reasons: In the first place, the distinction between branch banks of independent activities (as dealt with by Mr. Attorney-General Wickersham) and branch offices of national banks without discretionary powers (as dealt with by Mr. Attorney-General Daugherty) cannot be discussed within the proper limits of a paper of this import. Moreover, such distinction is of no consequence to the plaintiff in error if the validity of the state statute, forbidding as it does both forms of activity, is to be affirmed.

In the second place, if branch banking is of sound economic value it will somehow win through. But the regulation by one sovereignty of the operations of the other—or (which is the same thing) the creatures of the other—has to do with the very foundamentals of the dual government framed by our forefathers. The perpetuity of our institutions depends in no small measure upon the correct demarcation of the line which separates the functions of the two. It is our respectful, but earnest, insistence that the

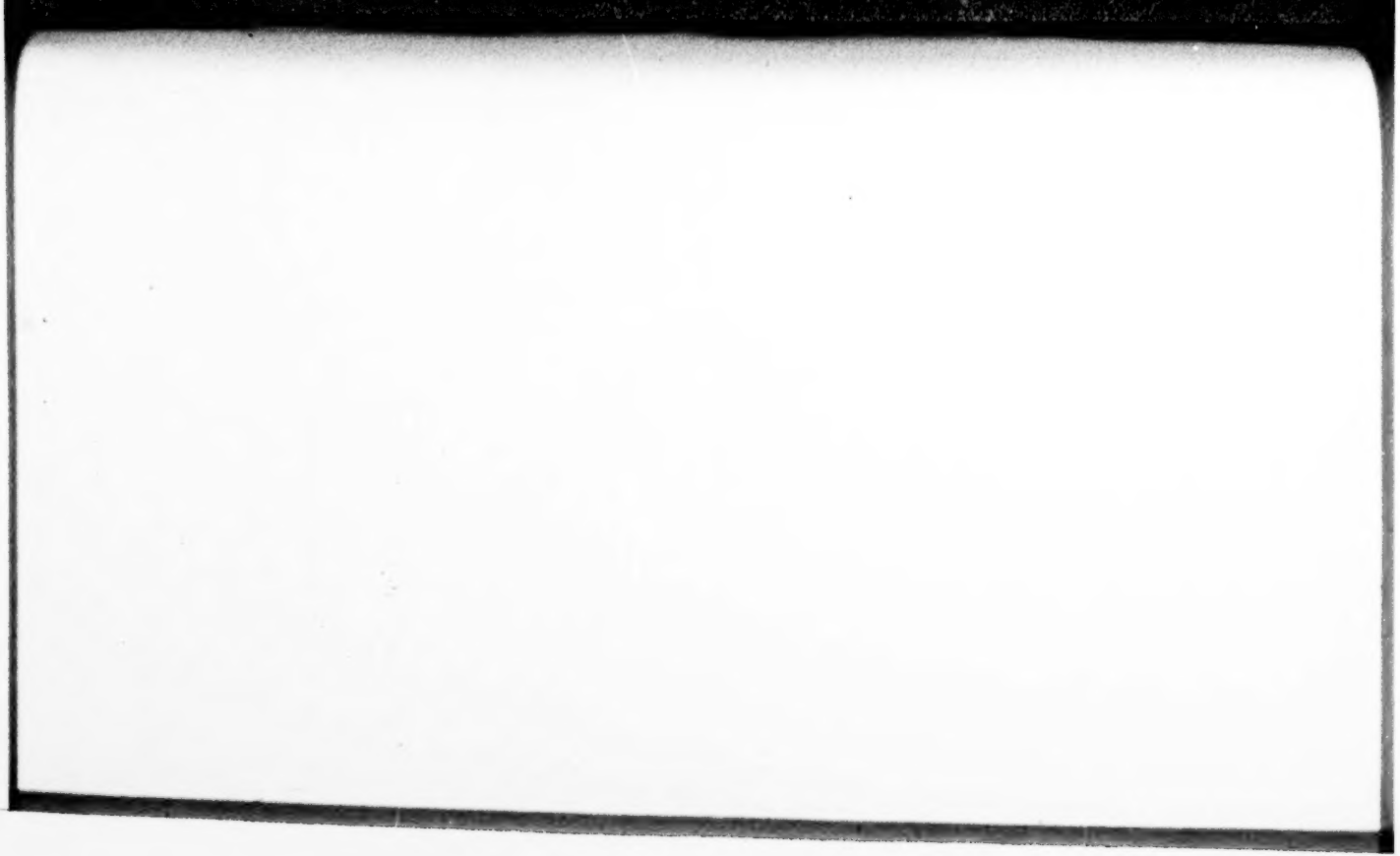
majority opinion in this case has confused this boundary.

Respectfully submitted,

JAMES C. JONES,
FRANK H. SULLIVAN,
For Plaintiff in Error.

We hereby certify that we are counsel for plaintiff in error in this case, and that the foregoing petition for rehearing was prepared by us, and that it is, in our opinion, well founded.

JAMES C. JONES,
FRANK H. SULLIVAN.



In the Supreme Court of the United States.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST. LOUIS, plaintiff in error,
v.
STATE OF MISSOURI, ON INFORMATION of Jesse W. Barrett, Attorney General.
No. 252.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

SUGGESTION OF UNITED STATES ON PETITION FOR REHEARING.

The Solicitor General, as *amicus curiae*, desires to join in the motion for rehearing filed herein on the following grounds:

This case having been twice argued, the United States should not ask for a rehearing, notwithstanding its importance, if every pertinent fact has been considered by the Court. In the many cases which I have had the honor to argue as Solicitor General in this Court, I have rarely asked for a rehearing, when the decision was adverse to the Government's contention. In this case I am impressed with the fact that in neither the majority nor the minority opinion is there any discussion of the Revised Statutes (Section 5239), on which I chiefly relied in my oral

argument as establishing a congressional direction that any question as to whether a national bank had exceeded its powers should only be determined in a suit instituted by the Comptroller of the Currency in the courts of the United States. (The section is quoted as an appendix.) The Government contended, and still contends, that this was an affirmative exclusion by Congress, in a matter over which the Federal Government had plenary power of legislation, of any right on the part of a State to determine by *quo warranto* the scope and powers of a national bank in the courts of the State.

The failure of the Court to discuss this statute suggests the possibility that with the great pressure of business the Court in considering this case overlooked it. If so, the Government earnestly hopes that a rehearing may be granted, so that the application of this statute to the question at issue may be argued and considered by the Court.

If, however, the Court did consider the application of this statute, and reached the conclusion that it was inapplicable, the Government does not feel justified in asking for a reargument, especially as it is not a party to the litigation and as the case has already been twice argued. While not a party to this case, the Government has a deep and practical interest in the question.

The application of the section is very earnestly pressed upon the Court. The Government expresses the hope that even if the Court does not consider this statute as affecting the decision already rendered, it

will at least in a supplemental opinion explain why it is not applicable in excluding the judicial power of the courts of Missouri to determine by the high prerogative writ of *quo warranto* the powers of a Federal instrumentality.

This suggestion is earnestly pressed for the reason that if the section is not applicable the reasons for this conclusion should be brought to the attention of Congress, so that the law-making body, if it is unwilling to submit these fiscal instrumentalities of the Government to the dual visitorial power of the courts of the State and of the Union, may by supplemental legislation make their purpose more clear.

JAMES M. BECK,
Solicitor General.

FEBRUARY, 1924.

APPENDIX.

Section 5239 of the Revised Statutes provides:

> If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, *in a suit brought for that purpose by the Comptroller of the Currency*, in his own name, before the associa-

tion shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation. (Italics ours.)

○